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No. 76-1254

In the Supreme Court of the United States

OCTOBER TERM, 1976

IN THE MATTER OF GAILLARD T. HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-20) is reported at 367 A. 2d 155.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1976. A petition for rehearing was denied on February 9, 1977 (Pet. App. 22). The petition for a writ of certiorari was filed on March 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the trial court erred in using the summary contempt procedures of D.C. Superior Court Criminal Rule 42(a) in fining petitioner $10 for being late to court.

2. Whether the evidence supported the court's finding of contempt of court.

STATEMENT

The relevant facts are not in dispute and are set forth in the opinion of the court of appeals (Pet. App. 16-17). On Friday, October 17, 1975, Judge Hess of the District of Columbia Superior Court admonished all participants in a criminal trial, including petitioner, the defense counsel, to appear in court promptly at 10:00 a.m. the following Monday. Petitioner appeared in court the following Monday at 10:07 or 10:08. When Judge Hess asked him to explain his tardiness, petitioner acknowledged that he was aware of the court's admonition to appear promptly, stated that he had made "herculean efforts to get here at ten o'clock" and asked whether the court wanted to hear his full explanation (Pet. App. 4). The court responded, "Yes, I do. Otherwise I will hold you in contempt" (*ibid.*). Petitioner then proferred a lengthy explanation to the effect that he had arrived at the courthouse at 8:45 a.m., had appeared before another judge for the purpose of postponing a motion, and had appeared at the preliminary hearing court at 9:45 a.m. to advise co-counsel in another case to proceed with a preliminary hearing without him. As soon as he found co-counsel, he proceeded directly to Judge Hess's courtroom (Pet. App. 4-6). Petitioner ascribed primary blame to the inefficient scheduling procedures of the Preliminary Hearing Court (*ibid.*). Judge Hess responded that under the court's rules trial matters take precedence over all non-trial matters,[1] that petitioner had had ample time to notify the clerk that he

[1]Super. Ct. Civ. R. 104(b)(3) provides: "Nontrial matters in a trial court will yield to trials in any court." This rule applies to criminal as well as civil proceedings. See Super. Ct. Crim. R. 57(a) (Pet. App. 16, n. 1).

would be late, and that therefore his absence was willful (Pet. App. 6).

Judge Hess summarily found petitioner in contempt under Rule 42(a) of the Superior Court Rules of Criminal Procedure and ordered him to pay a $10 fine. The court then issued an Order of Contempt reciting the facts and the basis for the finding (Pet. App. 7). Petitioner paid the fine and subsequently filed a motion for reconsideration to which he attached an affidavit restating the reasons for his tardiness and alleging, *inter alia*, that he had no intention of being late, that his subsequent investigation disclosed that the clock in the Preliminary Hearing Court was one minute behind the clock in Judge Hess' courtroom, and that he did not understand that a contempt citation was being considered when he gave his in-court explanation (Pet. App. 9-13). The court denied the motion, stating that petitioner had deliberately ignored the court's directive to appear and had violated Rule 104 (b)(3) by determining his own "order of priorities" (Pet. App. 14). The District of Columbia Court of Appeals affirmed (Pet. App. 15-20).

ARGUMENT

1. Petitioner argues primarily that the court erred in utilizing summary proceedings in finding him in contempt, because, he contends, an attorney's failure to appear on time is not conduct "committed in the actual presence of the court" within the meaning of Rule 42(a) of the Superior Court Criminal Rules (Pet. 7-12). Although petitioner relies on a number of federal appellate decisions interpreting Fed. R. Crim. P. 42(a) (Pet. 7-8), the District of Columbia Court of Appeals has rejected the contention in this and other cases interpreting Rule 42(a) of the Superior Court Criminal Rules. See *In re Rosen*, 315 A. 2d 151, certiorari denied,

419 U.S. 964; *In re Nesbitt*, 313 A. 2d 576, 578.[2] Those decisions constitute an authoritative interpretation of a local rule of procedure, and accordingly, there is no conflict that warrants this Court's review. Cf. *Pernell* v. *Southall Realty*, 416 U.S. 363, 368-369.

In any event, the particular circumstances of this case justified the use of the summary procedures of either the federal or the local Rule 42(a) rather than the notice and hearing procedures of Rule 42(b). While the purpose of the notice and hearing provisions of Rule 42(b) is "to inform the court of events not within its own knowledge" (*Sacher* v. *United States*, 343 U.S. 1, 9), all of the relevant facts in this case were within the personal knowledge of the court. The court knew that it had specifically admonished petitioner to appear on time, and that petitioner did not appear on time and did not notify the court he would be late. The court gave petitioner a full opportunity to explain his tardiness before finding him in contempt. Petitioner's affidavit filed in support of his motion for reconsideration does not add

[2]When petitioner stated (Pet. 7) that "[e]very circuit considering the question has agreed that a lawyer's tardiness is not conduct in 'the actual presence of the court' which may be punished summarily under Rule 42(a)," he apparently overlooked cases in the United States Court of Appeals for the District of Columbia Circuit. *In re Gates*, 478 F. 2d 998; *In re Niblack*, 476 F. 2d 930, certiorari denied, 414 U.S. 909, where the court held squarely that an attorney's tardiness may be summarily punished under Fed. R. Crim. P. 42(a).

materially to that explanation, and indeed the facts on which the court's finding was based are not in dispute.[3]

In those circumstances the formal notice and hearing provided for by Rule 42(b) would have served no purpose. Most of the cases cited by petitioner are not to the contrary. In *Jessup* v. *Clark*, 490 F. 2d 1068 (C.A. 3), *United States* v. *Delahanty*, 488 F. 2d 396 (C.A. 6), and *In re Lamson*, 468 F. 2d 551 (C.A. 1), the attorneys alleged facts which, if true, would have demonstrated that their failure to appear resulted from unforeseeable circumstances beyond their control—that is, circumstances that would have been a defense to, or in mitigation of, a charge of contempt. Petitioner, on the other hand, alleged no facts in defense or mitigation that would have required an evidentiary hearing to establish. The essence of his excuse was that he felt obliged to wait in the Preliminary Hearing Court until he could contact co-counsel in another case, notwithstanding a local rule that specifically provides that non-trial matters must yield to trial matters. In these circumstances, the observation of the court in *Jessup* v. *Clark*, *supra*, 490 F. 2d at 1072, is pertinent:

> If the judge did see or hear everything essential to a finding of contempt, so that all of the relevant facts are within his personal knowledge, then the value

[3]While petitioner's affidavit asserted that he had no intention of being late, the same assertion was plainly implicit in his in-court explanation. The alleged one-minute disparity between the clocks in the two courtrooms (Pet. App. 11) does not explain the seven-minute delay, and indeed, the affidavit merely confirms that petitioner has no explanation for why he was late (*ibid.*). The affidavit's statements that petitioner was careful not to overload his calendar and that he had never been late to Judge Hess's court before (Pet. App. 9-10) are not defenses to the charge but rather relate to the court's discretion in imposing sanctions.

> of a plenary hearing is minimal and, in a proper setting, is outweighed by the "need for immediate penal vindication." [Quoting from *Cooke* v. *United States*, 267 U.S. 517, 536.]

See also *in re Gates*, 478 F. 2d 998 (C.A. D.C.), *In re Niblack*, 476 F. 2d 930 (C.A. D.C.), certiorari denied, 414 U.S. 909.

Finally, even if summary proceedings were not available for dealing with attorney tardiness, the proceedings here may be properly regarded as satisfying the requirement of Rule 42(b), since petitioner was notified of the essential facts constituting the charge and given a reasonable opportunity under the circumstances to prepare a defense. See *In re Allis*, 531 F. 2d 1391, 1393 (C.A. 9), certiorari denied, 429 U.S. 900, where the court held that the requirements of Fed. R. Crim. P. 42(b) were satisifed when, as here, "[t]he facts were clear and undisputed. At no time was an indication given of the availability of other witnesses or evidence to support a defense of justification or excuse."[4]

2. Petitioner errs in contending (Pet. 14-17) that the evidence did not support the finding of contempt. Although petitioner alleges that he did not intend to be late, the evidence before the trial court, including particularly petitioner's own explanation, demonstrated that his lateness was the result, not of circumstances beyond his control or ability to foresee, but of his

[4]In view of the fact that petitioner was notified of the charge against him, was fully aware of the nature of the charge (his failure to appear on time), and was given a reasonable opportunity to be heard, there is no basis for petitioner's further contention that the proceeding denied him due process of law (Pet. 12-14).

voluntary choice between what he perceived to be conflicting obligations.[5] In view of Rule 104(b)(3) of the Superior Court Rules, which specifically assigns priority to trial matters, his choice satisfied the definition of contempt that petitioner himself sets forth (Pet. 14)—that is, "some departure from the contemnor's proper role in court proceedings, which * * * delays or frustrates the court's business." See *United States* v. *Seale*, 461 F. 2d 345 (C.A. 7). In short, the court of appeals correctly held (Pet. App. 19):

> The trial court properly inferred from appellant's actions and his explanation that he had deliberately and willfully substituted his own judgment for a direct order of the court even though his actions represented a good faith attempt to straighten out his conflicting obligations with two other courts.

Although we agree with petitioner that his conduct did not constitute a "serious crime" (Pet. 9, n. 3)—and neither the finding of contempt nor the opinion of the

[5]Indeed, petitioner's in-court explanation to Judge Hess (Pet. App. 3-6) reflects that he was fully familiar with the scheduling problems of the Preliminary Hearing Court. While it may be assumed that petitioner hoped to satisfy both obligations, the fact is not contrary to the conclusion of the courts below that his decision to remain in the Preliminary Hearing Court and run the foreseeable risk of being late to the trial court was a voluntary act.

Nor is there any basis for petitioner's assertion (Pet. 13-14) that the court of appeals' characterization of his conduct as "lingering at the preliminary hearing court" (Pet. App. 19) substituted a different offense from the one charged and found by the trial court. That characterization merely reflected the trial court's finding that petitioner's remaining in the preliminary hearing court was a voluntary act.

court of appeals suggests otherwise[6]—it did constitute a knowing infraction of a court order and rule of court. Trial courts must have wide discretion to deal with such infractions, and the relatively modest sanction imposed in this case, a ten dollar fine, was not an impermissible response. See *In re Gates, supra,* 478 F. 2d at 1000, n. 3.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[6]While we find quite understandable petitioner's concern about the contempt citation, the opinion of the court of appeals makes clear that the contempt citation does not reflect upon petitioner's good faith or professionalism (Pet. App. 19).